Office of Chief Counsel Internal Revenue Service

memorandum

CC: NER: PEN: PIT: TL-N-4229-99

MAYost

date:

to: Earold Scheller, Appeals Officer, Pittsburgh

from: Associate District Counsel, Pennsylvania District, Pittsburgh

subject:

Consent to Extend the Statute of Limitations
Tax Years:

DISCLOSURE STATEMENT

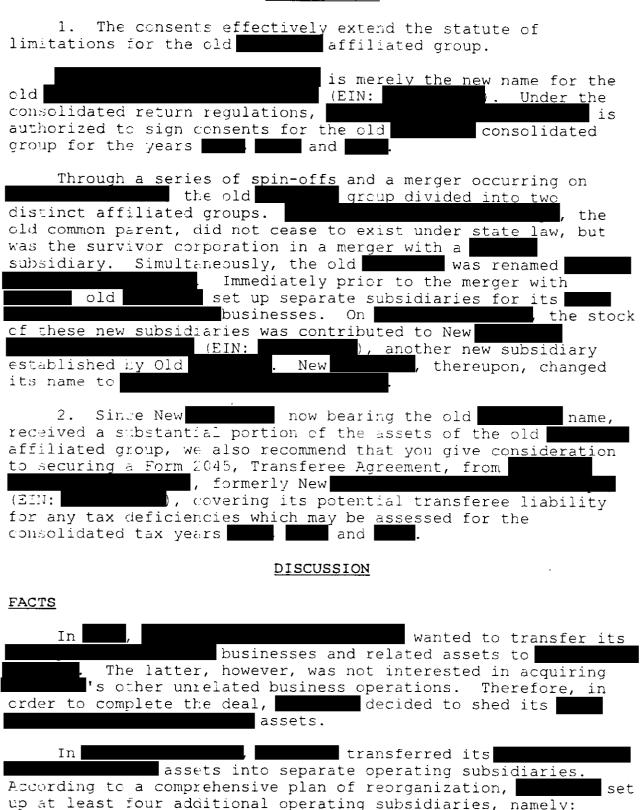
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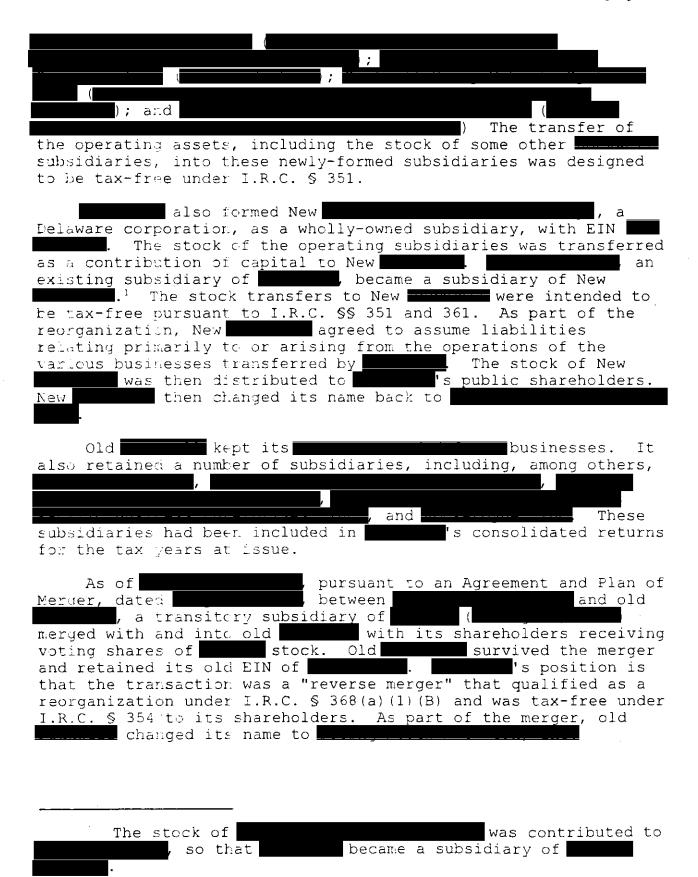
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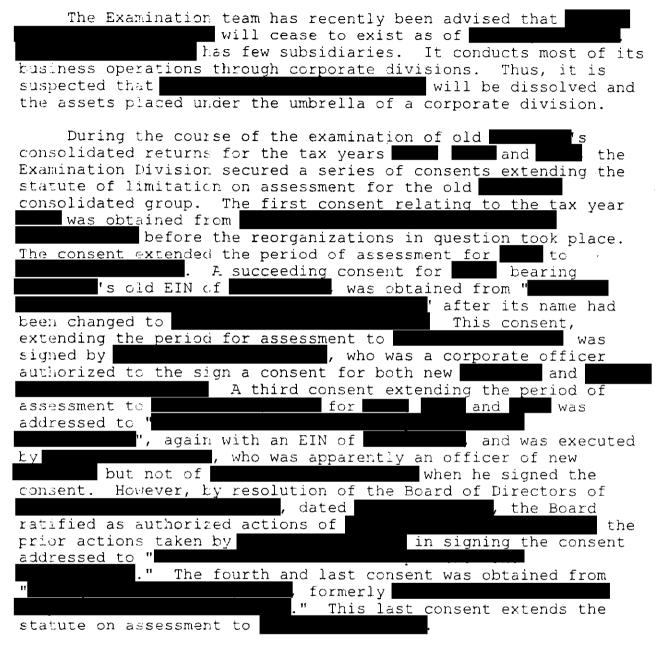
ISSUE

Whether a series of consents, with the last one being executed by " , formerly , effectively extend the statute of limitations on assessment for the old consolidated group for the tax years , and .

ADVICE GIVEN







LAW AND ANALYSIS

A. Consents

I.R.C. § 1501 grants affiliated groups of corporations the privilege of filing returns on a consolidated basis. If consolidated returns are filed, the members of the group consent to be bound by the legislative regulations promulgated pursuant to the authority in I.R.C. § 1502.

Under Treas. Reg. § 1.1502-77(a), the common parent of the consolidated group is the sole agent for each subsidiary in the group and duly authorized to act in its own name in all matters relating to the consolidated tax liability of the group. The common parent remains the agent for the members of the group for any years during which it was the common parent, whether or not consolidated returns are filed in subsequent years and whether or not one or more subsidiaries have become or have ceased to be members of the group at any time.

The express language of Treas. Reg. § 1.1502-77(a) supports the validity of a consent obtained from an old common parent for pre-transaction years after a reverse acquisition where the old common parent remains in existence. See also, Union Oil Company of California v. Cormissioner, 101 T.C. 130 (1993).

In In., the Service issued temporary regulations under I.R.C. § 1562. For taxable years for which the due date of the consolidated return (without extensions) is after the consolidated return (without extensions) is after the consolidated group. Treas. Reg. § 1.1502-77T provides alternative agents for purposes of extending the statute of limitations for a consolidated group. Under this regulation, where the common parent of the group ceases to be the common parent, whether or not the consolidated group remains in existence, a consent can be obtained from any one of several alternative agents for the group. The alternative agents under Temp. Treas. Reg. § 1.502-77(a) (4) are:

- (i) The common parent of the group for all or any part of the tax year to which the consent applies;
- (ii) A successor to the former common parent in a transaction to which I.R.C. § 381(a) applies;
- (iii) The agent designated by the group under Treas. Reg. § 1.1502-77(d); or
- (iv) If the group remains in existence after a reverse acquisition or downstream transfer,

We can not determine on the basis of the present factual information whether the merger of old qualified as a reverse acquisition within the meaning of Treas. Reg. § 1.1502-75(d)(3).

The common parent is the highest-tier domestic corporation in the group.

the common parent of the group at the time the consent is given.

In the instant case, common parent of the consolidated group during the tax years and remained in existence following the merger with the corporation simply changed its name to but continued to use its old EIN.

A change in corporate name does not terminate a corporation's existence. Moreover, Treas. Reg. § 1.1502-75(d)(2) provides that a common parent corporation will remain as the common parent irrespective of a mere change in identity, form, or place of organization.

also continues to have authority to act as the agent for the members of the consolidated group for the years , and for which it was the common parent, despite the fact that the consolidated group no longer exists. See Treas. Reg. § 1.1502-77(a) and Temp. Treas. Reg. §1.1502-77T(a) (4) (i). Thus, the consent addressed to and executed by " , is effective to extend the statute on assessment relating to the consolidated tax liability for the years , and ...

The prior consents for the old group, which were mis-addressed to after the name of was changed to , are defensible. The consents bear the EIN of and it was clearly the intention of the parties that the old common parent of the consolidated group extend the period for assessment. As indicated above, the Board of Directors for formally ratified one of these prior consents, when the signing official was not a comporate officer.

On their face, the prior consents addressed to but the prior but reflecting the EIN associated with are ambiguous as to the intended corporate taxpayer. If an ambiguity exists in a consent,

ceases to exist on or about such entity will no longer be available to execute any additional consents, if necessary. The Service will have to look to Temp. Treas. Reg. § 1.1502.77T to determine if there is an alternative agent cualified to sign consents in the future.

extrinsic evidence is admissible to clarify the ambiguity and to determine the intent of the parties, and the consent will then be interpreted in accordance with the parties' intent. See, Woods v. Commissioner, 92 T.C. 776, 780 (1989); Constitution Publishing Co. v. Commissioner, 22 B.T.A. 426, 428 (1931). In this case, the intent of the parties was to have the consents. Furthermore, even if no ambiguity is found to exist, since the use of the wrong corporate name appears to be a mutual drafting mistake, the prior consents are not invalid. A court would permit reformation of the consents to reflect the correct corporate name and thereby carry out the actual intent of the parties to have the former common parent extend the period of limitation on assessment for the consolidated group for the years and See Woods v. Commissioner, 92 T.C. at 782-783.

B. Potential Transferee Liability

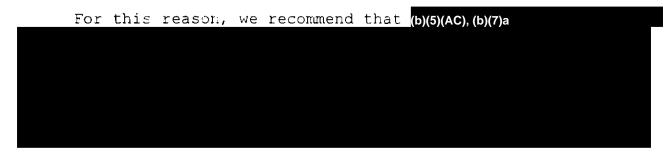
The ultimate result of the corporate reshuffling of
was to divide the company into two separate affiliated
groups. kept its business and
eventually merger with a subsidiary. Prior to the merger,
however, spun off its
businesses to newly-created subsidiaries and then the stock of
these subsidiaries was contributed to New
. The stock of New was then distributed to the
public shareholders of
Since substantial assets of old were transferred to
New as a result of the reorganization, we recommend that
the Exam team seriously consider the possibility that New
may be subject to transferee liability for any
deficiencies which may be assessed for the tax years
nd

If a taxpayer transfers assets to others, the transferee of the assets may become liable for the taxpayer's unpaid tax either at law or equity under state law. Federal law governs the procedures to assert such liability, but generally state law governs the elements establishing transferee liability. The law

I.R.C. § 6901 is merely a procedural statute. Curiously, under Treas. Reg. § 301.6901-1(b)(1), the definition of "transferee" for purposes of of I.R.C. § 6901 includes the successor of a corporation or a party to a reorganization as defined in I.R.C. § 363.

Commissioner, 44 T.C. 647 (1965). Transferee liability at law arises by statute or contract, whereas liability in equity normally arises when a transferor is left after the transfer without sufficient assets to satisfy its tax liabilities. In the corporate context, transferee liability generally accrues when a corporation transfers assets to another and the transferee assumes the liabilities of the transferor either expressly or impliedly; the transferee is merely a continuation of the transferor; the transfer amounts to a consolidation or merger; or the transfer is an attempt to escape debts. See West Texas Fefining & Dev. Co. v. Commissioner, 68 F.2d 77, 81 (10% Cir. 1935).

As indicated above, New agreed to assume liabilities of the old group relating primarily to or arising from the operations of the various businesses transferred to it. This assumption of liabilities is arguably broad enough to include Federal income tax liabilities. If so, New would be a transferee at law.



(b)(5)(AC), (b)(7)a

§ 5901 (c) (1) provides that the period of limitation for assessment of transferee liability is within one year after the expiration of the period of limitation for assessment against the transferor. The one year extension for the assessment of transferee liability begins at the expiration of the original period of limitation for assessment against the transferor, as properly extended by statute consents of the transferor. Field v. Commissioner, 32 T.C. 187 (1959), aff'd per curiam, 286 F.2d 960 (6th Cir. 1960), cert. denied, 366 U.S. 949 (1961). Here,

(b)(7)a

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